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March 2, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
Washington, D.C. 20554

In re: WT Docket No. 97-56
Marc D. Sobel d/b/a Airwave Communications

Dear Ms. Salas:

Transmitted herewith, on behalf of Marc D. Sobel d/b/a Air Wave Communications, are an original and fourteen copies of his Petition to Defer and Consolidate Consideration in the above-referenced proceeding.

Kindly direct any questions or correspondence concerning this matter to the undersigned.

Very truly yours,



Robert J. Keller
Counsel for Marc D. Sobel

cc: John J. Schauble, Esquire
William H. Knowles-Kellett, Esquire

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Marc Sobel)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
Certain Finder's Preferences)
)
Marc Sobel and Marc Sobel d/b/a)
Air Wave Communications)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
WT Docket No. 97-56

PETITION TO DEFER AND CONSOLIDATE CONSIDERATION

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Date: March 2, 1999

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TABLE OF CONTENTS

	<u>Page</u>
A. Introduction	2
B. Misrepresentation and Lack of Candor	4
C. Transfer of Control	15
Attachment No. 1 (transcript excerpts from admissions session in Kay proceeding)	
Attachment No. 2 (transcript of Marc Sobel's testimony in Kay proceeding)	
Attachment No. 3 (transcript excerpts of James Kay's testimony in Kay proceeding)	
Attachment No. 4 (revised agreement between Kay and Sobel)	

SUMMARY

Sobel herein ask the Commission to defer its review of the *Initial Decision of Administrative Law Judge John M. Frysiak* (FCC 97D-13) pending the issuance of an initial decision in WT Docket No. 94-147, the "Kay" proceeding, so that the Commission may consolidate consideration with any appeal from an initial decision in the Kay proceeding or, if there is no such appeal, to take into consideration the initial decision and the record in WT Docket No. 94-147 to the extent it bears on the issues under review in this proceeding.

The issues in this proceeding relate directly and inexorably to the business relationship between Kay and Sobel. Substantial evidence was adduced in the Kay proceeding relevant to these issues under consideration in this proceeding, including many hours of testimony by both Kay and Sobel. Some of the evidence offered in the Kay proceeding, while relevant to issues in the Sobel case, are not part of the record in this proceeding. In addition, much of the testimony and evidence in the Kay proceeding serves to expand upon and clarify the evidence that was adduced in the Sobel proceeding.

Commission consideration of the Sobel case will be greatly assisted and the public interest will be served by taking into consideration the further evidence adduced in the Kay proceeding, the determinations the Presiding Judge will make based on that evidence, and the subsequent briefs and arguments of the parties. This is particularly warranted given the harsh sanctions at issue here. Sobel operates a one-man land mobile radio business in the Los Angeles area. This business, of which the licenses at issue here are an integral part, is his livelihood. It is respectfully submitted that the public interest, convenience, and necessity requires great deference to Sobel in this situation. If evidence adduced in the Kay proceeding regarding these very issues has a bearing, it should be, at a minimum, taken into consideration as part of the Commission review process.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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WT Docket No. 97-56

To: The Commission

PETITION TO DEFER AND CONSOLIDATE CONSIDERATION

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney and pursuant to Section 1.41 of the Commission's Rules and Regulations, 47 C.F.R. § 1.41, and the First Amendment of the Constitution of the United States,¹ hereby respectfully petitions the Commission to defer its review of the *Initial Decision of Administrative Law Judge John M. Frysiak* (FCC 97D-13), released November 28, 1997 ("*Sobel ID*"), pending the issuance of an initial decision in WT Docket No. 94-147, the "Kay" proceeding.² It is further requested that the Commission consolidate consideration of the above-captioned case with any appeal from an

¹ The First Amendment guarantees, among other liberties, "the right of the people ... to petition the government for a redress of grievances." U.S. CONST. amend. I.

² See *WT Docket No. 94-147, James A. Kay, Jr., Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* (FCC 94-315), 10 F.C.C.R. 2062, (1994) (originally designated as PR Docket No. 94-147). Twelve days of trial were completed in the Kay proceeding during the period from December 21, 1998 through January 20, 1999. The record has now been closed and proposed findings of fact and conclusions of law are to be filed on March 26, 1999.

initial decision in WT Docket No. 94-147 or, if there is no such appeal, to take into consideration the initial decision and the record in WT Docket No. 94-147 to the extent it bears on the issues under review in this proceeding.

A. INTRODUCTION

There is an unavoidable connection between the Kay and Sobel proceedings. The sole substantive issue initially designated in the Sobel proceeding was whether or not Sobel had, by virtue of a management agreement between him and Kay, engaged in an unauthorized transfer of control of some of his stations to Kay.³ Shortly after designation, the Bureau sought enlargement of the issues to add a misrepresentation and lack of candor charge against Sobel, alleging that an affidavit executed by Sobel in January of 1994 and submitted by Kay in WT Docket No. 94-147 was inconsistent with and failed to disclose the management agreement.⁴ Substantial evidence was adduced in the Kay proceeding relevant to both of these issues.

³ *WT Docket No. 97-56, Marc D. Sobel, Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing and for Forfeiture* (FCC 97-38), 12 F.C.C.R. 3298 (1997). Issue (a) was: "To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated Sec. 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr." *Id.* at ¶ 6(a). The remaining issues were to determine, in light of the evidence adduced under issue (a), whether Sobel possessed basic qualifications and how to dispose of his existing licenses and pending applications. *Id.* at ¶ 6(b)-(d).

⁴ Both the agreement and the affidavit had been in the Bureau's possession for more than two years. Nonetheless, the Bureau did not raise the issue until one week *after* Sobel filed a pre-trial pleading asserting that an unauthorized transfer of control, even if proved, would not support license revocation in the absence of an intent to deceive the Commission or other disqualifying misconduct. *E.g., Deer Lodge Broadcasting, Inc.*, 86 F.C.C.2d 1066, 1095-1098 (1981); *Blue Ribbon Broadcasting, Inc.*, 90 F.C.C.2d 1023, 1026 (Rev. Bd. 1982); *Silver Star Communications - Albany, Inc.*, 3 F.C.C.R. 6342, 6355-6356 (Rev. Bd. 1988), *aff'd* 6 F.C.C.R. 6905 (1991); *Roy M. Speer*, 11 F.C.C.R. 18393, 18428 (1996). While this principal evolved in broadcast cases, it applies equally in the wireless services. *Brian L. O'Neill*, 6 F.C.C.R. 2572, 2575-2576 (1991); *Century Cellunet of Jackson MSA Limited Partnership*, 6 F.C.C.R. 6150, 6151 (1991); *Catherine L. Waddill*, 8 F.C.C.R. 2170, 2194 (1993).

The essence of the charges against Sobel are (a) that the December 30, 1994 Radio System Marketing and Management Agreement constitutes an unauthorized transfer of certain 800 MHz SMR stations to Kay; and (b) that a January 1995 affidavit executed by Sobel (and submitted by Kay in connection with a pleading he filed in WT Docket No. 94-147) constitutes misrepresentation and/or lack of candor because (allegedly) it inaccurately characterized the relationship between Sobel and Kay and failed to disclose the details of the management agreement. These matters were also addressed in the Kay proceeding. Both Kay and Sobel were called as witnesses by the Bureau and offered testimony regarding their business relationship, the management agreement, the January 1995 affidavit, etc.⁵ Some of the evidence offered in the Kay proceeding, while relevant to issues in the Sobel case, are not part of the record in this proceeding. In addition, much of the testimony and evidence in the Kay proceeding serves to expand upon and clarify the evidence that was adduced in the Sobel proceeding.

Commission consideration of the Sobel case will be greatly assisted and the public interest will be served by taking into consideration the further evidence adduced in the Kay proceeding, the determinations the Presiding Judge will make based on that evidence, and the subsequent briefs and arguments of the parties. This is particularly warranted given the harsh sanctions at issue here. Sobel operates a one-man land mobile radio business in the Los Angeles area. This business, of which the licenses at issue here are an integral part, is his livelihood. It is respectfully submitted that the public interest, convenience, and necessity requires great

⁵ Attachment No. 1 hereto is the transcript of the entire testimony of Marc Sobel in WT Docket No. 94-147, consisting of transcript page numbers 1690 through 1786. Attachment No. 2 hereto are excerpts from the testimony of James A. Kay, Jr. in WT Docket No. 94-147, consisting of transcript pages 1246-1247, 1299-1303, 1314, 1324-1325, 2368-2374, and 2440-2446. For purposes of clarity, transcript references and citations herein will indicate whether they are from the Kay proceedings in WT Docket No. 94-147 (e.g., Kay Tr. ____) or the Sobel proceeding in WT Docket No. 97-56 (e.g., "Sobel Tr. ____").

deference to Sobel in this situation. If evidence adduced in the Kay proceeding regarding these very issues has a bearing, it should be, at a minimum, taken into consideration as part of the Commission review process.⁶

B. MISREPRESENTATION AND LACK OF CANDOR

The crux of the Bureau's misrepresentation and lack of candor charge against Sobel involves an affidavit executed by Sobel in January of 1995 and included by Kay in a pleading he submitted in WT Docket No. 94-147. On January 25, 1995, Brown and Schwaninger, Kay's attorneys at the time, filed on behalf of Kay a *Motion to Enlarge, Change or Delete Issues* in WT Docket No. 94-147. WTB Ex. No. 44 in WT Docket No. 97-56. Included with that pleading was an affidavit executed by Sobel on January 24, 1995.⁷ Sobel's testimony in the Kay proceeding provides further elucidation and clarification regarding the affidavit and should be considered by the Commission as it reviews the initial decision in this proceeding.

The affidavit was drafted by Brown and Schwaninger, the same law firm that had, less than three months earlier, drafted the management agreement. Kay Tr. 1769. Sobel did not edit the affidavit. He reviewed it and, finding it to be factually accurate, signed it as it had been

⁶ The Commission's obligation to serve the public interest overrides any procedural technicalities. *See Clarksburg Publishing Co. v. FCC*, 225 F.2d 511 (D.C. Cir. 1955). The public interest is certainly furthered by assuring that a full and complete record is before the Commission before it considers imposition of the most severe sanction in its enforcement arsenal.

⁷ WTB Ex. No. 43 in WT Docket No. 97-56. Less than two weeks earlier, on January 11, 1995, Sobel had executed an identical affidavit. WTB Ex. No. 41 in WT Docket No. 97-56. Kay's attorneys initially directed their motion to the Commission, WTB Ex. No. 42 in WT Docket No. 97-56, and the re-executed affidavit was obtained so that the pleading could be refiled and directed to the Presiding Judge. For the sake of simplicity and clarity, we shall refer herein only to the later affidavit. Indeed, the Presiding Judge in the Kay proceeding received into evidence only the later pleading and affidavit, recognizing that the resubmission was for the sole purpose of correcting a clerical filing error. Kay Tr. 795 ("CHIEF JUDGE CHACKIN: I'm not going to receive 342 Clearly, this was a situation where a pleading was misdirected and counsel directed it to the right party.")

drafted. Kay Tr. 1769-1770. The affidavit states: “Mr. Kay has no interest in any radio station or license of which I am the licensee.” At the hearing in this proceeding, Sobel testified that he understood that phrase to mean that Kay had no **ownership** interest in the **licenses** themselves, Sobel Tr. 146-147, which is true. The Bureau, however, put forth the self-serving theory that Sobel’s testimony was inconsistent with “the plain language of the affidavit, which states that Kays has no interest in any of Sobel’s **stations** or licenses.” WTB Reply Brief at ¶ 12 (emphasis in original).⁸

The Bureau ignored the following uncontradicted testimony by Sobel: “I believe when we in the business talk about the radio station license, it is the license. It is the piece of paper issued by the FCC which gives you the authority to operate.” Sobel Tr. 147. During his testimony in the Kay proceeding Sobel further reiterated that he does not distinguish in his mind between the words “station” and “license,” but rather sees them as interchangeable. He noted that the authorizations he receives from the Commission in fact have printed on them, in large letters across the top, “Radio Station License.” Kay Tr. 1773-1774.⁹

In other circumstances this might be dismissed as little more than lawyers’ arguments over semantics. But when the substantive charge is misrepresentation and the penalty sought is license revocation, the question of what Sobel meant when he used the word interest is crucial. The Bureau has the burden of proving that Sobel in fact misrepresented or lacked candor and that

⁸ The Bureau is attempting to stretch the scope of the affidavit to include the base station equipment which, although leased by Sobel (see *Consolidated Brief and Exceptions* at p. 12), is admittedly owned by Kay. But Sobel was not thinking about the equipment when he signed the affidavit. As he testified in the Kay proceeding, he was concerned that the Commission had erroneously included his licenses within the scope of the Kay designation order, he did not believe that the Commission was seeking in any way to seize transmitter or repeater equipment. Kay Tr. 1776.

he is not qualified to remain a licensee.¹⁰ Intent to deceive is an essential element of misrepresentation and lack of candor. *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127 (1983); *Fox Television Stations, Inc.*, 10 F.C.C. Rcd 8452, ¶ 60 (1995). See also *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994). The Bureau did not prove deceptive intent during the Sobel proceeding, and the evidence adduced in the Kay proceeding further negates any possible finding that Sobel acted with deceptive intent. The Commission may not, as the Bureau urges, simply speculate as to what Sobel meant when he executed the affidavit until it stumbles upon a particular theory that supports the severe sanction it seeks to impose.

The contention that Sobel misrepresented or lacked candor rests not on evidence that Sobel intended to deceive the Commission but rather on the Bureau's own self-serving theories, developed years after the fact, of what the word "interest" **might** have meant. In *Lutheran*

⁹ The transcript, which has not yet been corrected, reports that Sobel said "regular" station license, but it is clear from the context (and a review of the audio tapes, if necessary, will confirm) that he actually said "radio" station license.

¹⁰ 47 U.S.C. § 312(d). The Bureau must prove its case by a "clear and convincing" standard of proof. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980) (Clear and convincing standard of proof applied to FCC revocation proceedings potentially affecting the licensee's livelihood."). Sobel is a solo businessman who depends on his land mobile radio business as his sole source of livelihood. It is respectfully submitted that *Sea Island* and the clear and convincing standard continues to be applicable to FCC revocation cases involving potential loss of livelihood notwithstanding the Supreme Court decision in *Steadman v. SEC*, 450 U.S. 91 (1981). See, e.g., *Lewell Broadcasting, Inc.*, 86 F.C.C.2d 896, 913-914 ¶ 32 (1981) (recognizing, with only a "cf." to *Steadman*, that *Sea Island* "holds that where a loss of livelihood is involved, the revocation of an FCC license must be proved by 'clear and convincing' evidence"); *Silver Star Communications-Albany, Inc.*, 3 F.C.C.R. 6342, 6350 n.18 (recognizing, after *Steadman*, that the clear and convincing standard may be proper in some circumstances); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 n.1 (Scalia, J.) (assuming without deciding, with only a "cf." to *Steadman*, that the Commission's application of a "clear, precise, and indisputable" standard of proof was valid).

Church-Missouri Synod v. FCC, 141 F.3d 349 (D.C. Cir. 1998), a case decided after the briefs were filed in this proceeding,¹¹ the Court expressly held that intent to deceive may not be determined on the basis of post-hoc interpretation of words of potentially ambiguous meaning. At issue there was whether a broadcast licensee lacked candor with the Commission in describing its hiring practices in connection with an EEO review by stating that a background in classical music was a "requirement" for certain positions when, in fact, some positions were occasionally filled by individuals with no such background. The Court stated:

The Commission relies on the AMERICAN HERITAGE DICTIONARY (New College Ed. 1976), which defines "requirement" as "[T]hat which is required; something needed" or "[S]omething obligatory; a prerequisite." *Id.* at 1105. But WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981 ed.) gives the word "requirement" more leeway, defining it: "something that is *wanted or needed*" or "something *called for or demanded*." *Id.* at 1929 (emphasis added.) We are not exalting one dictionary over another, but simply pointing out that the Commission has overstated the word's clarity. The Church's explanation for its use of the word "required" jibes with common understanding of the term. It is unremarkable to call a particular criterion a "requirement" even if you must sometimes bend it to fill a job opening. Particularly since the Church immediately clarified its position when questioned, it is an intolerable stretch to call its use of an ambiguous word an "intent to deceive." We are not surprised that the Commission could not point us to a single case where we have affirmed a finding of lack of candor on such slim facts. We vacate both the lack of candor determination and the \$25,000 forfeiture.

141 F.3d at 356-357.¹²

Sobel's testimony regarding how he understood the word "interest" when he signed the affidavit is inherently reasonable, and the Bureau has offered no evidence to contradict it. Moreover, there is extrinsic evidence corroborating the view that Sobel did not act with

¹¹ See Sobel's *Motion for Leave to File Supplement to Consolidated Brief and Exceptions* filed on May 28, 1998.

¹² The same analysis applies to the interpretation of the meaning of the word "employee" in the affidavit. The Bureau does not dispute that Sobel has never been an employee of Kay. Whether the term "employee" should be deemed to encompass services Sobel provides as an independent contractor for Kay requires fine post-hoc parsing of ambiguous meanings—precisely what the *Missouri Synod* court held will not support a finding of misrepresentation or lack of candor.

deceptive intent. For example, for some three or four years prior to entering into the written management agreement, Sobel and Kay operated under an oral arrangement. During the Kay proceeding Sobel testified that he requested that the relationship be reduced to writing after he became aware of a September 15, 1994, draft of a hearing designation order in the Kay proceeding. Kay Tr. 1751-1752. The draft, which Kay had obtained through a FOIA request and showed to Sobel, included the following statement: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions We believe these names include some or all of the following: Air Wave Communications [and] Marc Sobel dba Airwave Communications." Kay Tr. 1752; Kay Ex. No. 5 in WT Docket No. 94-147. Upon seeing this, Sobel asked Brown and Schwaninger, a Washington, D.C. communications law firm, to prepare a written agreement "to clarify our separateness, our positions as two businesses, and our relationship in my stations that the managed." Kay Tr. 1761.

When the written agreement was first prepared and executed in October of 1994, Sobel and Kay had operated under an oral arrangement for at least three years. Sobel was not dissatisfied with Kay's performance under the oral arrangement, he had no reason to distrust Kay, and he had no desire to modify the terms of their arrangement. Kay Tr. 1763. Sobel and Kay did not change the way they operated vis-à-vis the managed stations after executing the written agreement. Kay Tr. 1764. Thus, the sole purpose of the written agreement was to document, on paper, that Sobel and Kay were two separate and distinct individuals and businessmen, and that "Marc Sobel" was not a mere alias used by Kay. *Id.* There was no other reason or purpose for it. If Sobel were, as the Bureau claims, attempting to conceal his relationship with Kay, he certainly would not have reduced the relationship to writing after three

plus satisfactory years under an oral arrangement! Thus, the very existence of the written agreement is strong evidence that Sobel did not intend to conceal his relationship with Kay.

Sobel also took other actions that are entirely inconsistent with an intent to deceive the Commission. On December 6, 1994, Sobel wrote a letter to Gary Stanford of the FCC staff in Gettysburg, Pennsylvania. The purpose of the letter was to correct the Commission's apparent misconception that Sobel was an alias of Kay. Kay Tr. 1757-1759. In the letter, Sobel acknowledged that had an "association with" Kay and that he "conduct[s] business ... with Kay," but explained that he was a separate individual with his own land mobile business operations "going back to 1978 – long before I began conducting any business with Mr. Kay." WTB Ex. No. 46 in WT Docket No. 97-56; Kay Ex. No. 6 in WT Docket No. 94-147. Sobel expressly asked Mr. Stanford to investigate the matter and specifically invited Mr. Stanford to call him if any further information or assistance were required. *Id.* Gary Stanford never bothered to respond to the letter, nor did anyone else from the Commission ever contact Sobel regarding the letter. Kay Tr. 1759. Writing to the Commission, expressly acknowledging a business relationship with Kay, and specifically offering to provide any needed additional information are not the actions and statements of one who has an intent to conceal a relationship with Kay.

As early as 1995, after discharging Brown and Schwaninger, Sobel instructed his new communications counsel to open discussions with Wireless Bureau staff regarding the reasons for continued delays in processing Sobel's pending applications and requests. As a result, Bureau staff was expressly advised as early as 1995 that there was a written management agreement between Sobel and Kay, and that a copy of it had been produced in discovery in the Kay proceeding. Kay Tr. 1784-1785. At Sobel's request and direction, Bureau staff was advised that Sobel was willing to travel from California to either Washington, D.C. or Gettysburg,

Pennsylvania to meet with Bureau staff and answer any questions they might have. Kay Tr. 1784. In June of 1996, Sobel readily provided Bureau staff with a copy of the written management agreement in response to a Section 308(b) request. Kay Tr. 1782. Again, these are not the actions of one who intended to conceal the relationship.

The gravamen of the Bureau's argument that the January 1995 affidavit constitutes lack of candor is the fact that Sobel did not at that time or earlier either disclose the management arrangement or produce a copy of the management agreement. But this distorts the situation. The *Motion to Enlarge, Change or Delete Issues* (to which Sobel's affidavit was attached) was not submitted by or on behalf of Sobel. Sobel understood simply that he was being asked to sign an affidavit in connection with a pleading being prepared on behalf of Kay to attempt to correct a number of problems with the hearing designation order in the Kay proceeding, on small part of which was seeking the removal of the erroneously included Sobel call signs from the proceeding. Kay Tr. 1770; Sobel Tr. 162-165. The pleading was submitted on behalf of Kay in WT Docket No. 94-147, a proceeding to which Sobel was not even a party. Sobel did not see or review the pleading prior to its being filed, and he was not familiar with its contents. *Id.* The affidavit, which had been prepared by Brown and Schwaninger, was presented to Sobel by Kay. He reviewed it and, finding it to be factually accurate, signed it and gave it back to Kay. *Id.*

As Sobel has noted a number of times—and as the Bureau has never disputed—there is no Commission requirement that SMR licensees even disclose, much less submit copies of, management agreements. To suggest that Sobel had an affirmative duty to do so in a proceeding to which he was not a party and in a process over which he had not control—and to contend that he is guilty of lack of candor because he did not do so—is absurd. Sobel, a non-party to WT

Docket No. 94-147, was asked to sign a declaration to be used in that case.¹³ The affidavit was executed only weeks after Sobel had sent a letter to Gary Stanford regarding his relationship with Kay and inviting inquiries if the Commission staff required additional information. More importantly, at the time he signed the affidavit, Sobel actually believed that a copy of the written management agreement was going to accompany the pleading. Kay Tr. 1771-1772. While this turned out to be an incorrect assumption on Sobel's part, it was not an unreasonable one.¹⁴

Although the management agreement was not submitted with the January 1995 pleading, it was submitted only two months later, on March 24, 1995, as part of *Kay's Responses to Wireless Telecommunications Bureau's First Request for Documents*. The Bureau has argued:

The fact that Kay produced the agreement pursuant to an order of the Presiding Judge in the Kay case in March of 1995 is not evidence that Sobel acted in good faith. Sobel's affidavit was being used in an attempt to remove Sobel's licenses from the Kay proceeding. If the Sobel licenses had been removed from the Kay hearing, there would have been no basis for producing the agreement in discovery in the Kay proceeding. Thus, since Sobel was offering his affidavit to help remove his licenses from the Kay hearing, he could not have had an expectation that the agreement would be produced in the Kay proceeding.

WTB Reply Brief at ¶ 17. The Bureau's speculation that Kay would not have produced the management agreement if the Sobel call signs had been deleted from the Kay proceeding does

¹³ Sobel's position in this matter was essentially that of a non-party witness. In an adversarial adjudication (which a license revocation proceeding certainly is), if one party (Kay) elicits testimony from a non-party (Sobel), the adverse party (the Bureau) certainly has the right to solicit additional information from that witness. If the Bureau felt that additional information was required, it certainly had the right and the ability to seek it and introduce it. To decline to do so, however, and then later accuse the non-party of lacking candor because neither party asked him for the particular information in question smacks of gamesmanship bordering on abuse of process, if not abuse of regulatory power.

¹⁴ Sobel has previously testified that when he signed the affidavit he believed the Commission would soon be provided with a copy of the agreement if they did not already have it, and he further testified that it was neither his expectation nor intention that the affidavit would in any way prevent the Commission from becoming aware of the agreement. Sobel Tr. 302-303.

not withstand scrutiny. In compliance with the Bureau's discovery request,¹⁵ Kay produced copies of *all* written management agreements he was party to—not merely those involving call signs expressly cited in the Kay hearing designation order. For example, in addition to the management agreement with Sobel, Kay also produced virtually identical agreements with Vincent Cordaro and Jerry Gales (WTB Ex. Nos. 323 and 326, respectively, in WT Docket No. 94-147), even though these agreements related to call signs which were *not* part of the Kay designation order.

In any event, the nexus the Bureau attempts to fabricate between the production of the management agreement and the motion to remove Sobel's call signs from the Kay proceeding simply does not exist. This was clearly demonstrated by Sobel's testimony in the Kay proceeding and is confirmed by a review of the applicable documents. Of the eleven Sobel call signs listed in the Kay HDO, only two are subject to the management agreement.¹⁶ Kay Tr. 1775-1776. Kay has no connection to or involvement in the other nine Sobel stations listed in the Kay HDO, with the exception that he may sublease space to Sobel for one or more of these stations in exchange for a monthly rental payment. Kay Tr. 1778. Sobel, not Kay, provides the equipment for these stations. Sobel, not Kay, loads customers onto these stations. Sobel, not Kay, bills and collects

¹⁵ It is disingenuous for the Bureau to mischaracterize the scope of its own discovery request and thereby falsely suggest that the agreement would not otherwise have been produced. No doubt if Sobel were to attempt such an argument strategy, the Bureau would point to it as another example of alleged misrepresentation. Apparently, however, the Bureau need not adhere to the standard of conduct it demands of licensees.

¹⁶ The December 30, 1994, Radio System Management and Marketing Agreement together with the December 30, 1994, Addendum and Amendment to Radio System Management and Marketing Agreement relates to sixteen different call signs issued to Marc Sobel. (WTB Ex. No. 341 in WT Docket No. 94-147). Appendix A to the Kay HDO lists eleven call signs that were ostensibly held by Kay in the name of Marc Sobel. 10 F.C.C.R. at Appendix A, Items 154-164. Only two call signs (KNBT299 and KRU576) are common to both lists.

for services provided on these stations. In short, Kay has no connection with or involvement in the ownership or operation of these stations. Kay Tr. 1778.

Finally, the role of Brown and Schwaninger, the law firm that served as legal counsel to both Sobel and Kay, is highly pertinent to the question of whether Sobel had any intent to deceive the Commission. As previously mentioned, had it been Sobel's intention to conceal his relationship with Kay, he would never have asked that Brown and Schwaninger reduce the management agreement to writing—and certainly not at a time when he knew that Kay was under intense investigation by the Bureau. Brown and Schwaninger drafted the management agreement a week or two prior to its initial October 28, 1994, execution date. Kay Tr. 1776-1777. Sobel did not review preliminary drafts of the agreement; rather, he understood that it was a standard boilerplate used by Brown and Schwaninger to cover situations like the arrangement he had with Kay. Kay Tr. 1763. Less than three months later, Brown and Schwaninger also prepared the January 1995 affidavit for Sobel's signature. Kay Tr. 1777. It was certainly reasonable for Sobel to assume that his legal counsel, who were intimately familiar with the terms of the management agreement (having drafted it), would not shortly thereafter prepared for his signature, under oath, a document that was perjurious.

Although the Commission is reluctant to excuse violations based on the alleged failures of counsel, *see, e.g., Hillebrand Broadcasting, Inc.*, 1 F.C.C.R. 419, 420 n.6 (1986), the Commission is equally reluctant to impute a disqualifying lack of candor where there has been good faith reliance on advice of counsel, *see WEBR, Inc. v. FCC*, 420 F.2d 158, 167-68 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining who is acting with candor); *Broadcast Associates of Colorado*, 104 F.C.C.2d 16 (1986) (applicant who improperly certified application on advice of counsel not disqualified); *Video Marketing Network, Inc.*, 10 F.C.C.R.

7611 (1995); *Fox Television Stations, supra*. In this case, Sobel did more than rely on advice, legal counsel actually wrote both of the two documents that form the basis of the alleged misrepresentation and lack of candor.

In *Rainbow Broadcasting Co.*, 13 F.C.C.R. 21000 (1998), a case decided after briefs were submitted in this proceeding,¹⁷ the Commission was confronted with the issue whether a violation of the ex parte rules by legal counsel should be attributed to the licensee and, if so, what impact that should have on the licensee's basic qualifications. The Commission opined as follows:

Although applicants are bound by the acts of their agents, *see Carol Sue Bowman*, 6 FCC Rcd 4723 P4 (1991); *Hillebrand Broadcasting Corp.*, 1 FCC Rcd 419, 420 n. 6 (1986), and it is axiomatic that they are responsible for knowing and complying with the Commission's rules, these principles do not warrant disqualification of the applicant here. There is no doubt that the violations actually occurred and are attributable to Rainbow. Nevertheless, the applicant's knowledge of the misconduct is a highly relevant factor in determining whether disqualification is appropriate. *Centel Corp.*, 8 FCC Rcd 6162 (1993), *petition for review dismissed sub nom. American Message Centers v. FCC*, No. 93-1550 (D. C. Cir. Feb. 28, 1994), rehearing denied (May 25, 1994) (carrier not disqualified, despite multiple ex parte violations, where two of the violations were inadvertent and unintentional, and others involved reasonable belief contacts were permissible); *see also Voice of Reason, Inc.*, 37 FCC 2d 686, 709 (Rev. Bd. 1972), *recon. denied*, 39 FCC 2d 847, *rev. denied*, FCC 74-476, released May 8, 1974. Significantly, even where intentional ex parte misconduct has been found, the Commission has declined to disqualify applicants where, as here, the incidents were isolated events in the course of a long proceeding. *See Pepper Schultz*, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989), and cases cited therein, *rev. denied*, 5 FCC Rcd 3273 (1990); *see also Desert Empire Television Corp.*, 88 FCC 2d 1413, 1417 (1982) (imposing only modest monetary forfeiture where licensee engaged in willful and repeated ex parte communications on at least three separate occasions).

13 F.C.C.R. at 21022-21033 (underlined emphasis added). The same considerations are even more applicable here. Assuming arguendo that the January 1995 affidavit misstated or failed to disclose any material fact—something the Bureau has not demonstrated—the record is clear that

¹⁷ *See Sobel's Further Motion for Leave to File Supplement to Consolidated Brief and Exceptions* filed on October 2, 1998.

Sobel did not act with “knowledge of the misconduct,” but rather he acted in good faith reliance on the advice and actions of legal counsel. The record in this proceeding comes nowhere near the high bar required for disqualification and license revocation.

C. UNAUTHORIZED TRANSFER OF CONTROL

The Bureau’s contention under the unauthorized transfer of control issue is that the arrangement between Sobel and Kay with respect to Sobel’s 800 MHz stations (the “management agreement” stations) constitutes an unauthorized transfer of control. Although the unauthorized transfer of control issue as such was not designated in the Kay proceeding, during the November 30, 1998 admissions session in the Kay proceeding the presiding judge put the parties on notice that the determination whether Kay’s denial that he held an “interest” in Sobel’s licensed stations might require a *de novo* determination whether there was a *de facto* transfer of control. Kay Tr. 800-807 (copy appended hereto as Attachment No. 3). Indeed, much evidence was adduced at the hearing regarding the Sobel/Kay relationship that is relevant to the question whether there was a *de facto* transfer of control. It is respectfully suggested that, in order to assure itself of a complete record with all the relevant evidence, the Commission should defer its review of the initial decision in the Sobel proceeding pending issuance of an initial decision in the Kay proceeding.

Kay testified that the written management agreement between him and Sobel was a standard boilerplate agreement prepared by Brown and Schwaninger, his communications counsel at the time, and had been used by them for numerous clients. Kay Tr. 1246-1247. When questioned by the Presiding Judge whether the Commission had ever disapproved of this form of contract, counsel for the Bureau opined that the Commission has given only “mediocre guidance” on the issue. Kay Tr. 1247. Bureau counsel went on to admit: “There has been very

limited guidance. I do not think we are ever going to agree to which side of the line this fell on.”

Kay Tr. 1248. This admission by the Bureau is significant. Sobel has argued that the institution of license revocations proceedings for the alleged unauthorized transfer of control without giving him prior written notice and an opportunity to demonstrate or achieve compliance violated Section 9(b) of the Administrative Procedure Act. Section 9(b) provides in pertinent part:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, *before the institution of agency proceedings therefor*, the licensee has been given — (1) *notice by the agency in writing* of the facts or conduct which may warrant the action; and (2) *opportunity to demonstrate or achieve compliance* with all lawful requirements.

5 U.S.C. § 558(c) (emphasis added). Section 9(b) of the Administrative Procedure Act.¹⁸

Consolidated Brief and Exceptions at pp. 4, 6-9. The Bureau has argued that Section 9(b) does not apply on the theory that Sobel’s conduct falls within the “willfulness” exception of the statute. But to fall within the exception, the willfulness must be manifest. *Packing Co. v United States*, 350 F.2d 67 (10th Cir. 1965). The licensee must have acted intentionally or with notorious neglect of “explicit provisions” of law. *Eastern Produce Co. v. Benson*, 278 F.2d 606

¹⁸ This provision “makes revocation unlawful unless the licensee is given notice and an opportunity to demonstrate or achieve compliance with all lawful requirements *before proceedings are instituted*.” *Pass Word, Inc.*, 86 F.C.C.2d 437, 440 (1981) (emphasis added). The purpose of Section 9(b) is to protect licensees from “unfair surprise” in enforcement proceedings and to afford a noncompliant licensee a “second chance” to bring itself into compliance prior to imposition of the ultimate and extreme sanction of license revocation. *See, e.g., Air North America v. Department of Transportation*, 937 F.2d 1427 (9th Cir. 1991); *Hutto Stockyard, Inc. v. Department of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1990); *Lawrence v. Commodities Futures Trading Commission*, 759 F.2d 767 (9th Cir. 1985); *Great Lakes Airlines, Inc. v. CAB*, 291 F.2d 354 (9th Cir. 1961). A licensee is thus entitled to “an opportunity to change his conduct before his license can be revoked.” ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT at 90-91 (1947). “[I]f a particular licensee should under ordinary circumstances transcend the bounds of the privilege granted to him, the agency which has granted him the license must inform him in writing of such conduct and afford him an opportunity to comply ... before it can revoke ... his license.” *Id*

(3rd Cir. 1960). Clearly a licensee can not be deemed to have violated “manifest” requirements of “express provisions” if, as the Bureau now admits, the agency has given only “mediocre guidance” as to what the regulatory requirement is.

Assuming *arguendo* it is ultimately determined that the management arrangement did constitute an unauthorized transfer of control, there is still considerable evidence in the Kay record that should be taken into account in determining what impact, if any, such a finding has on Sobel’s basic qualifications. For example, Sobel offered extensive testimony regarding the details of his relationship with Kay, the extent of his own involvement in the application for licenses and the construction, maintenance, and operation of the stations. Kay Tr. 1717-1750. This testimony further supports the position Sobel has consistently advanced in this proceeding, namely, that his arrangement with Kay regarding the 800 MHz repeaters is a legitimate resale or channel capacity lease arrangement, typical of the industry, and does *not* constitute an impermissible abdication of control.

Evidence was also adduced, however, that out of an abundance of caution Sobel and Kay have repudiated the management agreement and replaced it with a new contract. Kay Tr. 2370-2374; Kay Ex. No. 64 in WT Docket No. 94-147. Attachment No. 4 hereto is a copy of the new agreement. Kay explained the reason for the new agreement as follows:

[W]hile we [*i.e.*, Kay and Sobel] believed the initial agreement was perfectly legal in all four corners, the Commission's scrutiny and the ruling that came from the Marc Sobel matter clearly indicated that the agreement may have some problems. So, we have had counsel draft a new agreement which hopefully will be more on all four corners with the Commission's expectations, and we executed the new agreement.

Kay Tr. 2371. In short, the parties were forced to make this unilateral effort to resolve the matter because of the Bureau’s stubborn insistence on costly litigation rather than cooperative negotiations. Long prior to designation of this proceeding, Sobel repeatedly attempted to obtain

from the Bureau a specific statement of its concerns, and he repeatedly offered to meet with the Bureau to discuss any of those concerns and to make any modifications to his operations they may require. *Consolidated Brief and Exceptions* at pp. 4, 8-9. Had the Bureau accepted these good faith overtures, the amended agreement could have been affected years ago and the private and public expense of this proceeding would have been avoided. At a minimum, therefore, the Commission should take the amended agreement into consideration as mitigating any unintentional transfer of control resulting from the prior agreement.

WHEREFORE, in consideration of the foregoing, it is requested that this Motion to Defer and Consolidate Consideration be granted.

Respectfully submitted,

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1 (Witness excused.)

2 (Whereupon, a short recess was taken.)

3 CHIEF JUDGE CHACHKIN: Back on the record.

4 Whereupon,

5 MARC DAVID SOBEL

6 having been first duly sworn, was called as a witness

7 herein, and was examined and testified as follows:

8 CHIEF JUDGE CHACHKIN: Please be seated. This

9 witness is under subpoena, is that correct?

10 MR. SCHAUBLE: Correct, Your Honor.

11 CHIEF JUDGE CHACHKIN: The witness is represented

12 by counsel?

13 MR. SCHAUBLE: Yes, Your Honor.

14 CHIEF JUDGE CHACHKIN: Would you identify
15 yourself, sir?

16 MR. EISEN: Your Honor, my name is Eric Eisen. I
17 am counsel for Mr. Sobel.

18 CHIEF JUDGE CHACHKIN: All right. Mr. Schauble,
19 are you going to start the examination?

20 MR. SCHAUBLE: Yes, Your Honor.

21 CHIEF JUDGE CHACHKIN: Go ahead.

22 MR. SCHAUBLE: First of all, I would note, Your
23 Honor, that you have in evidence portions of WTB Exhibits
24 328 and 329, which are the testimony of this witness. I do
25 not intend to repeat matters that were done previously in

1 those exhibits.

2 CHIEF JUDGE CHACHKIN: All right.

3 DIRECT EXAMINATION

4 BY MR. SCHAUBLE:

5 Q Sir, please state your name and address for the
6 record?

7 A Marc David Sobel, 11507 Lillywood Court, North
8 Park, California 93021.

9 Q Okay, good morning, Mr. Sobel. The Judge has
10 issued what's called a sequestration order in this
11 proceeding. Have you had discussions with anyone concerning
12 testimony of any of the witnesses who have previously
13 testified at the hearing in the last several weeks in this
14 case?

15 A No.

16 Q Under the sequestration order, you may not discuss
17 your testimony with any of the Bureau's witnesses until
18 after they have testified. The remaining witnesses are
19 Kevin Hessman and Vincent Cordaro. We anticipate that their
20 testimony will be done in the next couple days. Do you
21 understand that?

22 A Yes.

23 Q Okay. Mr. Sobel, are you familiar with the LTR
24 trunking format?

25 A Yes.

1 Q Are any of the 800 MHz stations that are licensed
2 to you part of an LTR trunk group?

3 A In a way, yes.

4 Q Okay. Would you please describe in what way they
5 are part of that group?

6 A Well, they're not directly wired to a system.
7 They operate as if they were.

8 Q Okay. Do you know which stations those are?

9 A Not offhand.

10 Q Would you know at which mountaintops those
11 stations are located?

12 A Hollywood Hills and Santiago Peak.

13 Q Do you know the frequency of the stations in
14 question?

15 A Not offhand.

16 Q Would these be 800 MHz stations?

17 A Yes.

18 Q Now, are there other stations in these LTR trunk
19 groups that are licensed to somebody other than yourself?

20 A Yes.

21 Q And, who is the licensee of those other stations?

22 A James Kay.

23 Q Just so the record is clear, these stations are
24 stations that are licensed to you are the subject of a
25 management agreement between yourself and Mr. Kay?

1 A Yes.

2 Q Let me ask you this, Mr. Sobel. For your stations
3 that are part of the LTR trunk group, do you make any effort
4 to determine what revenues there might be that are
5 attributable to your station?

6 A Yes.

7 Q For the stations that are part of an LTR trunk
8 group, how do you make that determination?

9 A I look it up on a computer database.

10 Q Is it based on the revenue, divided by how many
11 stations there are in the LTR trunk group?

12 A Yes.

13 Q Let me ask you this question. Is there one or
14 more than one LTR trunk group that one of your 800 MHz
15 stations is part of?

16 A Can you clarify that?

17 Q Sure. You testified that you have stations at
18 Hollywood Hills and at Santiago Peak that are part of an 800
19 MHz LTR trunk group, correct?

20 A Yes.

21 Q Okay. Is that one LTR trunk group or two
22 different LTR trunk groups?

23 A Two different groups.

24 Q For the LTR trunk group at Hollywood Hills, do you
25 know how many stations total are part of that group?

1 A Two.

2 Q How many stations are part of the LTR trunk group
3 for the Santiago Peak station?

4 A I believe it's just one.

5 Q Let me ask you, Santiago Peak, is that licensed as
6 a conventional or a trunk station?

7 A Conventional.

8 Q Could you explain for the record how the LTR trunk
9 group operates at Santiago Peak as one conventional station?

10 A How much detail do you want?

11 Q A brief summary.

12 A The map, the LTR map, includes my frequencies.
13 The radios have the ability to choose my channel if my
14 channel is available at the moment.

15 Q Do the radios also have the capability to use
16 other channels?

17 A Yes.

18 Q Do you know the other channels?

19 A Well, this map has 20 channels, but not all of
20 them are functional.

21 Q Is it correct that the other functional channels
22 would be for stations licensed to Mr. Kay?

23 A As far as I know, yes.

24 Q Mr. Sobel, do you recall which 800 MHz licenses
25 from you were obtained through assignment?

1 A No.

2 Q Turn to the book in there labeled Exhibits 291 to
3 328. Turn to Tab 328.

4 (Pause.)

5 BY MR. SCHAUBLE:

6 Q Specifically, Mr. Sobel, to the page marked 100,
7 line 24, going to 101, line 12.

8 MR. KELLER: I'm sorry, say again?

9 MR. SCHAUBLE: One hundred, Line 24 to 101, line
10 12.

11 MR. KELLER: You're making references, we're
12 making references, to the original transcript numbers?

13 MR. SCHAUBLE: Yes.

14 MR. KELLER: Okay.

15 MR. SCHAUBLE: Your Honor, can we go off the
16 record?

17 CHIEF JUDGE CHACHKIN: Yes.

18 (Discussion held off the record.)

19 MR. KELLER: I thought that was strictly --

20 MR. EISEN: I think there's some confusion here.
21 Can we go back off the record?

22 CHIEF JUDGE CHACHKIN: Off the record.

23 (Discussion held off the record.)

24 CHIEF JUDGE CHACHKIN: Back on the record.

25 BY MR. SCHAUBLE:

1 Q Mr. Sobel, have you had an opportunity to review
2 the material?

3 A Yes.

4 Q Does that refresh your recollection in ways to
5 which licenses could be obtained through assignment?

6 A Not really.

7 Q Okay. Do you have any reason to believe that the
8 information in here is incorrect?

9 A No.

10 (Pause.)

11 MR. SCHAUBLE: Your Honor, at this time, I'd like
12 to renew my motion to admit to the record, pages 100, line
13 24 to 101, line 12. I think for the purposes of a complete
14 record, we should have the records of which authorizations
15 Mr. Sobel obtained through assignment.

16 I've asked the witness, and he doesn't have any
17 independent recollection, but I think this is an accurate
18 record of --

19 CHIEF JUDGE CHACHKIN: Stipulate to it -- there's
20 no stipulation.

21 MR. KELLER: Your Honor, I have no objection if he
22 wants to refer to it. I just didn't want to restipulate,
23 you know, for purposes of this proceeding. The Bureau
24 should have, the Bureau might wish to produce information
25 which would be within its control and knowledge as to

1 whether assignments were subject to these stations and they
2 could ask official notice to be taken of it.

3 I mean, this is information that you could get out
4 of your own possibly files -- the witness sitting here today
5 says he doesn't remember this, and I certainly don't want to
6 stipulate to this. And, I'm not trying to be difficult.
7 Remember, the procedures were different in the other
8 proceeding. There were dual burdens. We had burdens in
9 that proceeding, as well as you.

10 Here, the Bureau has the exclusive burden of
11 proceeding, and this is information that the Bureau could
12 easily secure from its own files and then offer official
13 notice.

14 CHIEF JUDGE CHACHKIN: There's no objection on
15 relevance?

16 MR. KELLER: I don't object to the information
17 coming in for whatever purpose they want to offer it. I do
18 not want it to come in as a stipulation. If they want to
19 offer it that they asked the witness and the witness stated
20 that he doesn't have any reason to know it's incorrect, but
21 he doesn't know whether it's correct, I have my problems
22 with the record so reflecting.

23 CHIEF JUDGE CHACHKIN: Do you have the
24 information? I'll take official notice of it.

25 MR. SCHAUBLE: Your Honor, we can attempt to.

1 Very well, Your Honor.

2 CHIEF JUDGE CHACHKIN: All right.

3 BY MR. SCHAUBLE:

4 Q Mr. Sobel, please turn to the other volume, which
5 is --

6 A I'm sorry, what section?

7 CHIEF JUDGE CHACHKIN: Which section?

8 MR. SCHAUBLE: 331, Mr. Sobel.

9 BY MR. SCHAUBLE:

10 Q And, the question, Mr. Sobel, is do you recognize
11 these were applications filed?

12 A Yes.

13 Q Do these applications relate to 800 MHz stations
14 that were subject to a management agreement between you and
15 Mr. Kay?

16 A Yes.

17 MR. SCHAUBLE: Your Honor, at this time, I move
18 WTB Exhibit 331 into evidence. Your Honor indicated he
19 wanted all exhibits that were subject to the part referred
20 to in the transcripts. WTB Exhibits 328 and 329, those
21 portions that are in evidence in this proceeding that Your
22 Honor wanted the underlying exhibits, I believe this is one
23 of those exhibits.

24 (The document referred to was
25 marked for identification as

1 WTB Exhibit 331.)

2 CHIEF JUDGE CHACHKIN: You mean, this hasn't been
3 offered before?

4 MR. KNOWLES-KELLETT: It has not been admitted
5 into evidence, Your Honor.

6 MR. KELLER: It was not?

7 CHIEF JUDGE CHACHKIN: Is there any objection?

8 MR. KELLER: Let me review my records. I mean, I
9 would like at this time a statement of what the relevance of
10 this is, given the specific issues in the proceeding.

11 MR. KNOWLES-KELLETT: You already reviewed the
12 transcript. What happened is, we withheld, when you had
13 objections to the whole transcript coming in --

14 MR. KELLER: Understood.

15 MR. KNOWLES-KELLETT: -- we withheld moving the
16 exhibits into evidence until we designated relevant
17 portions.

18 MR. KELLER: I guess what confused me is certain
19 of those exhibits were already moved in. My question now
20 is, what's the relevance of this specific exhibit, given the
21 specific issues in this case? I understand its relevance in
22 the Sobel case, but what's its relevance to this case?

23 MR. KNOWLES-KELLETT: Okay, what it has to do with
24 is primarily just completing the records because of the
25 references to exhibits that don't exist and the portions of

1 the transcript we moved in.

2 MR. SHAINIS: Will that have the numbers that you
3 currently have here?

4 MR. KNOWLES-KELLETT: I think that, actually, Your
5 Honor, he raises a good point. We're going to have to come
6 up with a key that says WTB Exhibit 231 --

7 MR. SCHAUBLE: Your Honor, we provided that in our
8 letter. I can tell you, in the Sobel hearing, this was WTB
9 Exhibit 1.

10 MR. KELLER: I would offer the Bureau something to
11 look at overnight, to see if this -- I have no objection to
12 the exhibit being admitted for that purpose, but this is not
13 a concession that it's relevant. We'll leave later argument
14 whether it's relevant.

15 CHIEF JUDGE CHACHKIN: Well, if there's no
16 objection, I'll receive WTB Exhibit 331.

17 (The document referred to,
18 having been previously marked
19 for identification as WTB
20 Exhibit 331, was received in
21 evidence.)

22 BY MR. SCHAUBLE:

23 Q Mr. Sobel, please turn your attention to WTB
24 Exhibit 338.

25 (The document referred to was

1 marked for identification as
2 WTB Exhibit 338.)

3 MR. KELLER: Before we leave that, did you state
4 in your cross-reference letter --

5 MR. SCHAUBLE: It was WTB Exhibit 1 in the Sobel
6 hearing.

7 MR. KELLER: So, this was Exhibit 1 of the Sobel
8 hearing?

9 MR. SCHAUBLE: And, again, Your Honor, I would
10 state for the record that what's been marked for
11 identification as Exhibit 338 in this hearing was admitted
12 into evidence as WTB Exhibit 25 in the Sobel hearing.

13 CHIEF JUDGE CHACHKIN: All right, is there any
14 objection? Oh, wait, ask the witness. Go ahead.

15 BY MR. SCHAUBLE:

16 Q Mr. Sobel, do you recognize this document?

17 A Yes.

18 Q Could you explain for the record what these
19 documents are?

20 A They're copies of my invoices to Mr. Kay.

21 Q Okay. Now, when you performed work for Mr. Kay,
22 would you provide him with another sort of working record of
23 the work you did for him?

24 A Another paper, that's it.

25 Q It's correct that from time to time, you've

1 installed repeaters for Mr. Kay, correct?

2 A Yes.

3 Q When you installed a repeater for Mr. Kay, would
4 you provide him with any sort of written measurements or
5 test results?

6 A No.

7 MR. SCHAUBLE: Your Honor, at this time, I move
8 WTB Exhibit 338 into evidence.

9 CHIEF JUDGE CHACHKIN: Any objection?

10 MR. KELLER: No objection.

11 CHIEF JUDGE CHACHKIN: Bureau Exhibit 338 is
12 received.

13 (The document referred to,
14 having been previously marked
15 for identification as WTB
16 Exhibit 338, was received in
17 evidence.)

18 MR. SCHAUBLE: Your Honor, I have no further
19 questions. I would note that we have extensive written
20 testimony from Mr. Sobel in the record, which is subject to
21 cross-examination.

22 CHIEF JUDGE CHACHKIN: I don't know why you
23 brought him down here for just --

24 MR. KNOWLES-KELLETT: We offered to cancel, Your
25 Honor, and they said they wanted him presented for trial.

1 CHIEF JUDGE CHACHKIN: All right.

2 MR. SHAINIS: Your Honor, the reason for it was, I
3 said we would want to cross him, unless they would be
4 willing to withdraw exhibits concerning matters that Mr.
5 Sobel had particular information on.

6 They would not obviously do that, and that's why
7 Mr. Sobel is here.

8 CHIEF JUDGE CHACHKIN: All right, cross-
9 examination? You can examine him as to anything that's been
10 received with respect to Mr. Sobel.

11 MR. KELLER: Now, is it my understanding of the
12 three Bureau exhibits, Your Honor, I'm a little confused and
13 I want to review the bidding, because 331 was just now
14 admitted, as was 338?

15 MR. SCHAUBLE: 332 through 337 has been rejected.

16 MR. KELLER: Right, and was not 339 through 341
17 were already admitted, correct?

18 MR. SCHAUBLE: That's my understanding.

19 CHIEF JUDGE CHACHKIN: Yes, 339, 340, and 341 have
20 been received.

21 MR. SCHAUBLE: 342 was rejected. 343 would be in
22 part and 344 was rejected.

23 CHIEF JUDGE CHACHKIN: Well, 342 and 343 were just
24 the same document, just sent to different people. One was
25 to the Commission and one was to the Judge.

1 MR. KELLER: Right, one was rejected. One
2 preliminary matter before I get into the cross-examination,
3 Your Honor.

4 It was just mentioned by Bureau counsel, Your
5 Honor rejected Exhibits 332 through 337 at the admissions
6 session, and then at the opening day of this hearing,
7 pursuant to the preliminary matter, also various segments of
8 the hearing transcripts, 328 and 329, were also excluded.
9 There was one oversight and it was excluded on the basis
10 that it made reference to the testimony regarding these
11 other exhibits that had been excluded.

12 At that time, I failed to note one other minor
13 section in the transcript, so this would be an exhibit 328,
14 I believe, transcript pages 238 through 239. I believe
15 that's in Exhibit 328, but I wanted to double check.

16 CHIEF JUDGE CHACHKIN: 328 was rejected.

17 MR. KELLER: Well, portions of 328 and 329 were --

18 CHIEF JUDGE CHACHKIN: Yes, they supplemented.

19 MR. KELLER: They submitted things and then you --
20 then I moved another portion to be stricken, which you did
21 strike, and I'm not making the same objection. There was
22 just one little oversight that I made and that was pages
23 238, so this is in Exhibit 329, I think.

24 MR. SCHAUBLE: Page 238 is in Exhibit 329.

25 MR. KELLER: Page 238, currently under the

1 Bureau's designations and as of your last ruling, page 238,
2 line 15 and page 329, line 16, is still technically in the
3 record, 239. Let me restate that again. Exhibit 329, page
4 328, line -- 238, line 15 through page 239, line 16, is
5 still technically in the record, but I move that that also
6 be stricken for the same reasons. It refers to this whole
7 series of statements which are not in evidence and which
8 were excluded. It's the same ruling that you made twice
9 before and this was just an oversight.

10 CHIEF JUDGE CHACHKIN: What's the Bureau's
11 feeling?

12 MR. SCHAUBLE: Your Honor, the Bureau agrees that
13 this does relate to matters discussed by Mr. Keller. The
14 Bureau believes that this matter is relevant for the reasons
15 it stated previously, but we understand Your Honor's ruling.

16 CHIEF JUDGE CHACHKIN: All right, so now we're
17 talking about what lines, page three --

18 MR. KELLER: Page 238, line 15.

19 CHIEF JUDGE CHACHKIN: Page 238, line 15.

20 MR. KELLER: Through 239, line 16. In conjunction
21 with your other rulings, Your Honor, that would result in
22 the total exclusion of pages 238 and 239. Because all the
23 other lines on those two pages have already been rejected --
24 either rejected or not included by the Bureau originally.

25 CHIEF JUDGE CHACHKIN: All right, with respect to

1 Bureau Exhibit 329, page 238, line 15 to page 239, line 16,
2 is rejected.

3 (The document referred to,
4 having been previously marked
5 for identification as WTB
6 Exhibit 329, page 238, line 15
7 to page 239, line 16, was
8 rejected as evidence.)

9 MR. SCHAUBLE: Your Honor, may we bring up a
10 preliminary matter before, concerning whether Mr. Kay
11 intends to counter-designate any other portions of this
12 exhibit as --

13 MR. KELLER: No, we simply intend to cross-examine
14 on it. If there's any matter we feel is relevant to
15 clarification or edification, then we'll put a list through
16 cross-examination.

17 CHIEF JUDGE CHACHKIN: Are you ready to begin
18 cross-examination?

19 MR. KELLER: Yes.

20 CHIEF JUDGE CHACHKIN: Very well, go ahead.

21 CROSS-EXAMINATION

22 BY MR. KELLER:

23 Q Okay, Mr. Sobel, I would like you to keep Exhibit
24 238 -- I'm sorry, I'm getting totally confused with these
25 numbers -- Exhibit 329, if you could open your book to

1 Exhibit 329? And, I'd like you to begin at transcript page
2 73.

3 MR. SCHAUBLE: I believe 73 is in Exhibit 328, not
4 329.

5 MR. KELLER: Like I said, I'm totally confused.
6 You're right, 328, I'm sorry, Mr. Sobel.

7 BY MR. KELLER:

8 Q I'm going to make references to the original
9 transcript page numbers. At some point, that is going to
10 skip over some sections, from Exhibit 328 to Exhibit 329.
11 You'll know that when it happens.

12 Exhibit 329, I believe, the record begins at
13 transcript page 210. Are we together on page 273?

14 A Okay.

15 Q Now, Mr. Sobel, it states there at line three, you
16 became interested in holding 800 MHz licenses in the early
17 1990s, correct?

18 A Yes.

19 Q How long had you been involved in the mobile
20 business at that time?

21 A I started around 1976 and --

22 Q To correct myself, I said 1980s, it's true that
23 the testimony says 1990s, correct?

24 A Correct.

25 Q The testimony is correct?